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FILED
Clerk, U.S. District Court
JUL 25 2002
Central District of California
By /s/ (initials) Deputy

ENTERED
Clerk, U.S. District Court
JUL 26 2002
Central District of California
By /s/ (initials) Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ITTELLA FOODS, INC.,
Plaintiff,

v.

ZURICH INS. CO., ET AL.,
Defendants.

CV 01-3620 LGB (PLAx)

ORDER DENYING DEFENDANT'S RULE 50 MOTION REGARDING PUNITIVE DAMAGES

Defendant Northern Insurance Company of New York (Northern") brings the instant motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50 regarding the jury's verdict, rendered after a trial on Ittella's breach of covenant of good faith and fair dealing claim, that

plaintiff Ittella Foods, Inc. ("Ittella") is entitled to punitive damages under California Civil Code § 3294.[1]

Under Federal Rule of Civil Procedure 50, this Court can overturn the jury and grant Northern's motion only if, under the governing law, there can be but one reasonable conclusion as to the verdict. In other words, the motion should be granted only if "there is no legally sufficient basis for a reasonable jury to find for that party on that issue." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 149 (2000). In ruling on the Rule 50 motion, the Court must accept the jury's credibility findings consistent with the verdict and may not substitute its view of the evidence for that of the jury. *Id.* at 151.

Under California law, the governing law in this case, punitive damages are recoverable where it has been found, by clear and convincing evidence, that Northern is guilty of oppression, fraud, or malice. Cal. Civ. Code § 3294. Both malice and oppression are defined as involving "despicable conduct" which, in the case of malice, is carried on by the defendant with a willful and conscious disregard of the rights or safety of others and, as to oppression, is conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. *Id.* Despicable conduct is defined as conduct which is so vile, base, contemptible, miserable, wretched or loathsome that it would be looked down upon and despised by ordinary decent people. *Tomaselli et al. v. Transamerica Ins. Co.*, 25 Cal.App.4th 1269, 1287 (1994). Such conduct has been described as "[having] the character of outrage frequently associated with crime." *Id.* Fraud means an intentional misrepresentation,

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[1] On July 3, 2002, after a one-day punitive damages trial, the jury awarded Ittella $12 million in punitive damages.

deceit or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury. Cal. Civ. Code § 3294. The clear and convincing standard requires a finding of "high probability . . . requiring that the evidence be "so clear as to leave no substantial doubt; sufficiently strong to command an unhesitating assent of every reasonable mind." *Tomaselli,* 25 Cal.App.4th at 1287-88. In applying the standards governing Rule 50 and punitive damages, this Court thus should grant Northern's Rule 50 motion only if there is no legally sufficient basis for a reasonable jury to find that the evidence is so clear as to leave no substantial doubt that Northern is guilty of oppression, malice or fraud.

Having reviewed Ittella's responsive papers to Northern's Rule 50 motion including its "objections" to this Court's tentative order granting Northern's motion,[2] the Court finds

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[2] Northern submitted a request to strike Ittella's "objections" to the Court's tentative order on the grounds that the Court only agreed to allow the parties to submit citations to evidence and not any argument. Northern's Request to Strike Ittella's Objections at 2. In the alternative, Northern requested that the Court grant it an opportunity to respond to Ittella's objections and to provide additional argument, authorities, and evidence in support of its motion. *Id.* The Court subsequently granted leave for Northern to file such a response and on July 16, 2002, Northern filed its "Response to Plaintiff's Objections and Supplement to its Objections" ("Northern's Final Response") which included additional argument, authorities, and evidence in support of its Rule 50 motion. On July 18, 2002, the Court also received Ittella's "reply brief" to Northern's response. This filing, along with Ittella's July 11, 2002 "Supplement to its Objections to the Court's Tentative Order," however, was not authorized by the Court an as such, both documents are STRICKEN and will not be considered by the Court. The parties are seriously cautioned against needlessly and excessively multiplying the proceedings by filing unauthorized documents. 29 U.S.C. § 1927. Both parties have been

that Ittella's argument with regards to each of the malice, oppression, and fraud prongs centers around three points: (1) that Northern purposefully indicated that the value of the destroyed product was covered by the product recall coverage even though it knew there was "absolutely" no basis in the policy to reach such a conclusion, (2) that Northern ignored Ittella's claim under the first-party property coverage provisions of the policy, and (3) that Northern applied the governmental action and ordinance or law exclusions even though it knew that the "threshold" conditions had not occurred.

The record, when viewed in the light most favorable to Ittella, reveals that in October of 2000, the original independent adjuster assigned to Ittella's claim, Gary Brown of Maxson Young, recognized and notified Northern that the claim implicated a preliminary estimated product loss of $421,000, Exhibit 29; that in November of 2000, the second adjuster on the claim, Rich Dugo of the San Francisco Property Office, similarly acknowledged and notified Northern that Ittella was seeking coverage for both product loss under Section 1 of the Property Coverage portion of the policy and product recall expenses due to listeria contamination, Exhibit 50; and that on November 9, 2000, management in Northern's Property Office structure recognized that "the overall impact of the case is to product recall" and that the "big exposure is the first party Claims by the insured," Exhibit 30. In a similar vein, the record also shows that by December 14, 2000, Myron Wasiunec of the Pollution Unit had concluded that the "product itself [was] not covered in [the] liability portion's product recall coverage," Exhibit 58. Yet, on January 4, 2000, Wasiunec, with Carol Stark's approval, informed Ittella

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given enough opportunities to submit argument, evidence, and citations regarding Northern's Rule 50 motion, both in written and oral form.

that the $171,599.05 claimed loss for the product sold to Sam's Club and subsequently destroyed, and the $13,022.35 claimed loss for the product destroyed at the Safeway-NorCal warehouse were subsumed under the Product Recall Coverage Expense sublimit of $50,000, Exhibit 61. Evidence was also introduced at trial to show that Northern never addressed Ittella's claim under the Property Coverage portion of the policy until January 29, 2000 when Northern, for the first time, applied the Government Exclusion, Ordinance or Law Exclusion, and the Pollution Exclusion to bar coverage, Exhibit 82. Carol Stark, who expressly approved the January 4th and 29th letters and who was authorized by Northern to make the coverage decision on behalf of the carrier conceded on cross-examination that she knew that the Governmental Exclusion only applied if a governmental seizure had occurred and that she realized that no government had seized any of Ittella's product. May 22, 2002 Transcripts at 64:6-64:15. Consistent with the jury's verdict, the Court assumes that the jury did not believe Stark's explanation that she nevertheless believed the exclusion was applicable based on her "prior knowledge" of how recalls work to be credible.

The conclusions to be drawn from the aforementioned pieces of evidence, when viewed in the light most favorable to Ittella and resolving all credibility determinations in line with the jury's verdict against Northern, is that: (1) Northern consciously avoided paying out under the Property Coverage despite knowing full well that was the "big exposure" issue, (2) Northern delayed in addressing Ittella's claim for the value of product loss under the Property Coverage provisions of the policy, (3) once Northern finally realized that it would have to address Ittella's claim for the value of product loss under the first-party Property coverage provisions, it applied coverage exclusions even the Government Exclusion that it *knew* did not apply, and (4) it engaged in such actions even though it

knew that the losses suffered by Ittella were significant. Exhibit 17 to Pl's Supplemental Citations, Sam Galletti's Letter. In so concluding, the Court disagrees with Northern that the evidence presented at trial supports the contention that Ittella and its agents had initially characterized its *entire* loss as falling within the Product Recall coverage. Northern's Final Response at 1. In any event, such evidence would not detract from the fact that Northern's own brokers subsequently recognized that the "big exposure issue" was the Property Coverage provisions of the policy and the fact that this recognition occurred prior to Northern's written determination that the insurer would pay out under the Product Recall Coverage only. Though Northern argues that it continued to work on Ittella's claim for destroyed product after January 4, 2000, the only evidence that it points to as support merely shows that it had stated to Ittella that it would consider any "new information received" and that it encouraged Ittella to submit "additional information" concerning the business interruption loss claim, Exhibit 62, January 4, 2000 Letter at 323; Exhibit 69, January 5, 2002 Letter at 332; Exhibit 71, Wasiunec e-mail. Furthermore, there is no evidence in the record to support Northern's claim that it had requested coverage opinions. Northern's Final Response at 8. Despite Northern's protests to the contrary, the fact that the FDA "would have sized Ittella's unsafe and contaminated product if it refused to remove it from the marketplace" does not satisfy the threshold conditions for applying the Government Exclusion. *Id.*

The Court finds that the above conclusions are not only "consistent with the hypothesis of malice, fraud, gross negligence, or oppressiveness" but are " inconsistent with the hypothesis that such tortious conduct was the result of a mistake of law of fact, honest error or judgment, overzealousness, mere negligence, or other such noniniquitious

human failing." *Tomaselli*, 25 Cal.App.4th at 1288 n.14. The conclusions also support the level of "despicable conduct" required for malice and oppression and the Court finds that there is a "high probability" that Northern carried on such conduct with a willful and conscious disregard of the rights of Ittella and subjected Ittella to cruel and unjust hardship in conscious disregard of Ittella's rights. In additional, the conclusions support a "high probability" that Northern's conduct constituted fraud, both with respect to its attempt to con Ittella into believing that its product lossclaim was covered by the Product Recall coverage and with respect to its claim that the Governmental Exclusion was applicable when the carrier knew otherwise. Pl's Objections to Court's Tentative at 10.

Based on the foregoing, the Court DENIES Northern's Rule 50 motion and finds that clear and convincing evidence supports the jury's verdict that Northern is guilty of malice, oppression, or fraud.

IT IS SO ORDERED.

Dated: July 25, 2002

/s/ Lourdes G. Baird
LOURDES G. BAIRD
United States District Judge